

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

NOV 23 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Application of GTE Corporation, Transferor)
And Bell Atlantic Corporation, Transferee, for) CC Docket No. 98-184
Consent to Transfer of Control)

OPPOSITION OF
e.spire COMMUNICATIONS, INC.

e.spire Communications, Inc. ("e.spire"), by its attorneys, hereby submits this opposition to the application of GTE Corporation ("GTE") and Bell Atlantic Corporation ("Bell Atlantic") requesting authority to transfer control in the above-captioned proceeding.¹ As explained in greater detail below, GTE and Bell Atlantic (collectively "Applicants") have failed to demonstrate that the proposed merger is in the public interest. Accordingly, e.spire respectfully requests that the Commission preserve the "spirit of competition" envisaged by Congress in enacting the Telecommunications Act of 1996 ("1996 Act") and deny the application of Bell Atlantic and GTE for approval of a transfer of control.

No. of Copies rec'd
List A B C D E

045

¹ GTE Corporation and Bell Atlantic Corporation Seek FCC Consent for a Proposed Transfer of Control and Commission seeks Comments on Proposed Protective Order Filed by GTE and Bell Atlantic, CC Docket No. 98-184, *Public Notice*, DA 98-2035 (rel. Oct. 8, 1998); Application for Transfer of Control, *In the Matter of GTE Corporation, Transferee, for Consent to Transfer Control*, CC Docket No. 98-184 (filed Oct. 2, 1998) ("Application").

I. INTRODUCTION

e.spire, through its operating subsidiaries, is a facilities-based competitive local exchange carrier ("CLEC"). Since its formation in 1993, e.spire has constructed state-of-the-art digital SONET-based fiber optic networks in 32 markets, over which e.spire provides local exchange, exchange access, frame relay and long distance services to its customers. e.spire also provides resold interexchange services to customers nationwide.

At the outset, e.spire applauds the Commission's continuing efforts to open the local markets to competition in the manner intended by the 1996 Act. Indeed, e.spire recognizes that the Commission has taken great measures to ensure fair competition for all carriers and strongly encourages the Commission to continue its efforts until full and effective competition is realized in every market.

In general, e.spire supports the comments filed in this proceeding by the Competitive Telecommunications Association ("CompTel"), of which e.spire is a member. Like CompTel, e.spire is concerned that the latest ploy by incumbent local exchange carriers ("ILECs") to circumvent the pro-competitive mandate of the 1996 Act by forging alliances with other ILECs will seriously impede competitive entry into the local market. While mega-mergers and acquisitions are increasingly prevalent, e.spire believes that, in the case of monopoly local service providers, the trend towards consolidation will actually undermine rather than promote competition by limiting the number of carriers able to effectively compete against the monopoly carrier in each market.

The Commission must recognize that local competition has not taken root sufficiently and, as a result, CLECs, such as e.spire, do not yet have the market presence to offset the devastating impact of another merger between ILECs. Accordingly, e.spire joins CompTel in

urging the Commission to “draw the line” on the latest round of merger requests by Bell Atlantic and GTE as well as SBC and Ameritech. Undoubtedly, approval of yet another merger will result in a local services industry controlled by fewer competitors than that which existed when the 1996 Act was passed and even more frightening, move the industry one step closer to a national market once again controlled by one monolithic ILEC. Clearly, a return to the pre-1984 national monopoly environment is inconsistent with Congress’ and the Commission’s vision of competition and, therefore, contrary to the public interest.

II. THE APPLICANTS FAIL TO PROVE THAT THE PROPOSED MERGER SERVES THE PUBLIC INTEREST

A. The Applicants Must Prove That the Proposed Merger Meets the Public Interest Standard Under Sections 214(a) and Section 310(b) of the Communications Act

As a condition precedent to the grant of an authorization for a transfer of control, Section 214(a) and 310(b) of the Communications Act require the Applicants to demonstrate that their proposed merger is in the public interest. The public interest standard is both flexible and broad, and generally requires the Commission to weigh the potential benefits of the proposed transaction against the potential harms. The Commission must ensure that the transaction, at a minimum, does not interfere with the objectives of the Communications Act and, on balance, serves the public interest.² Specifically, in determining whether a proposed merger meets the public interest standard, the Commission, among others things, may consider whether the merger will “enhance[] access to advanced telecommunications and information services . . . in all

² *Applicants for Consent to the Transfer of Control of Licenses and Section 214 Authorization from Southern New England Telecommunications Corporation, Transferor to SBC Communications, Inc., Memorandum Opinion and Order*, CC Docket No. 98-25 ¶ 13 (rel. Oct. 23, 1998).

regions of the Nation”³ and whether the merger will “open[] all telecommunications markets to competition.”⁴ Under these standards, e.spire submits that Bell Atlantic and GTE fail to demonstrate that the proposed merger is in the public interest.

B. The Proposed Merger Undermines the Pro-Competitive Mandate of the Communications Act and, Therefore, Is Contrary to the Public Interest

e.spire opposes the proposed merger between Bell Atlantic and GTE for several reasons. First, as a general policy matter, e.spire submits that the time has come for the Commission to firmly establish that mergers between and among the incumbent LECs violate the principles of fair competition underlying the Communications Act. Since the enactment of the 1996 Act, the Commission has approved mergers between SBC Communications, Inc. (“SBC”) and PacTel, SBC/Pactel and the Southern New England Telephone Company (“SNET”), Bell Atlantic and NYNEX, and currently is reviewing a request for a merger between Ameritech Corp. and SBC. Although each merger, including the proposed Bell Atlantic/GTE and SBC/Ameritech, is predicated on the theory that larger, stronger ILECs provide the best hope for breaking down existing monopolies, the ILECs, once merged, have made little or no effort to enter out-of-region markets. Thus, rather than promoting competition, each merger has resulted in one less ILEC capable of entering out-of-region markets on a competitive basis. At this juncture, the Commission must recognize that the stated intent of the ILECs to provide out-of-region local service is merely a pretext. Indeed, as demonstrated by the repeated requests for transfers of

³ *Applications of Teleport Communications Group, Inc., Transferor, and AT&T Corp., Transferee, for Consent to Transfer of Control*, 13 FCC Rcd 15236 ¶ 11 (1998).

⁴ *Applications of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, FCC 98-225, CC Docket No. 97-211 ¶ 9 (1998) (“MCI-WorldCom Order”).

control, the ILECs' real strategy is to consolidate where possible in order to keep control of existing bottleneck facilities in the hands of the Regional Bell Operating Companies ("RBOCs").

Second, the approval of the merger would eliminate the potential for significant competition within the existing Bell Atlantic and GTE regions. In essence, by agreeing to merge, Bell Atlantic and GTE also have agreed not to compete against each other. This agreement not to compete is particularly alarming since Bell Atlantic and GTE are among the largest ILECs and given their size, enormous resources, consumer base and name recognition, possess great potential for effective competition against other ILECs. Although the Applicants claim that there is no basis to conclude that either company would be an entrant in the other's territory,⁵ and even more ludicrous, that a merger is necessary in order for them to have the ability to compete out-of-region,⁶ their actions, especially those of GTE, indicate otherwise.

For example, GTE North, Inc. has expressed a desire to enter into the New York local market. GTE also concluded interconnection agreements in Pennsylvania and Virginia and filed an application, though withdrawn the day before it filed the merger application, requesting authority to provide service in the Bell Atlantic-Virginia territories. Such progressive steps to obtain the requisite authority to provide service in the Bell Atlantic territories is a clear indication that GTE is ready and able to compete beyond its existing territories and, consequently, must not be permitted to merge with a potential competitor. Moreover, if CLECs such as e.spire, MFS, Brooks Fiber and TCG have on their own developed the network

⁵ See *Application, Public Interest Statement* at 25, n.22. The Applicants, however, do concede that there potential competition exists in specific areas in Pennsylvania and Virginia where the companies are proximate.

⁶ See *id.* at 6-8.

infrastructure to compete with the ILECs, surely companies as large and resourceful as Bell Atlantic and GTE can do the same.

Finally, e.spire is concerned that the Application fails to provide a plan that adequately addresses how GTE, as a Bell Atlantic affiliate, will resolve its Section 271 conflict in the Bell Atlantic region. As the Commission is aware, GTE provides long distance service throughout the United States, including in the Bell Atlantic territory. It also is likely that GTE is providing interLATA data services from the Bell Atlantic region through its BBN affiliate. Under Section 271, however, a merged Bell Atlantic/GTE would be prohibited from providing long distance service in any Bell Atlantic state without prior authorization. While Bell Atlantic drops a footnote notifying the Commission of its intent to obtain Section 271 approval,⁷ the only state in which Bell Atlantic currently is seeking Section 271 clearance is New York. e.spire submits that consistent with Section 271, the Commission must reject the merger without further consideration unless GTE exits the interLATA market in every Bell Atlantic state or Bell Atlantic obtains Section 271 authority.

C. A Bell Atlantic and GTE Merger Would Create Disturbing Concentration In The Market for Internet Access

The proposed merger has a disturbing potential to undermine competition in the market for Internet services. GTE currently is one of the leading providers of Internet services. In the Application, GTE expresses its intent to construct a national fiber network that would include the Bell Atlantic territory, providing the Applicants with a dangerously high share of the market for Internet access. Moreover, approval of the Bell Atlantic/GTE and SBC/Ameritech mergers

⁷ See *Application* at 3 n. 14.

would place control of access to more than 70 percent of existing Internet users in the hands of only two companies. Thus, as fellow RBOCs with bottleneck control of Internet access, the two merged entities could collude to exchange traffic on terms more favorable than that offered to others thereby preventing other carriers from providing meaningful competition in the Internet services market.

III. THE COMMISSION SHOULD DENY THE BELL ATLANTIC-GTE MERGER ON THE BASIS OF BELL ATLANTIC'S FAILURE TO COMPLY WITH THE BELL ATLANTIC-NYNEX MERGER CONDITIONS AND GTE'S TRACK RECORD ON PERMITTING COMPETITION

e.spire submits that the best criterion for determining whether Bell Atlantic should again receive approval to obtain control of another large company is to look at its track record in the prior merger with NYNEX. Indeed, complaints filed by MCI, MCImetro and AT&T illustrate that the company has failed to comply with the conditions connected with the NYNEX transfer of control.⁸ In particular, to date, Bell Atlantic/NYNEX, has failed to comply with several conditions related to operation support systems ("OSS") including the condition that it provide uniform interfaces for OSS functions throughout their combined region within fifteen months after the date of the merger order. Such blatant disregard for the conditions instituted by the Commission to ensure the development of meaningful competition clearly demonstrates Bell Atlantic's unwillingness to compete fairly. It also forecloses a conditional approval as a way to counteract the anticompetitive effects of a Bell Atlantic-GTE merger. Moreover, Bell Atlantic's failure to comply with the conditions ordered by the Commission clearly evidences that approval

⁸ See, e.g., Complaint of MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc., Federal Communications Commission File No. E-98-12 (filed Dec. 19, 1997); Complaint of AT&T Corp. v. Bell Atlantic Corporation, Federal Communications Commission File No. E-98-5 (filed Nov. 5, 1998).

of a second merger will only provide Bell Atlantic with additional means to perpetuate its anticompetitive behavior. Accordingly, at the very least, the Commission should immediately reject the application at issue in this proceeding and refuse to consider any further applications until Bell Atlantic has complied with each condition of the Bell Atlantic-NYNEX order. Only upon fulfillment of these conditions should the Commission begin to consider whether another acquisition by Bell Atlantic is in the public interest.

Moreover, GTE's efforts to open its local markets, to date, have not been subjected to the scrutiny associated with Section 271 entry by an RBOC. On every key issue-- including testing of OSS, provisioning of CLEC services and elements, performance standards and account relationships with CLECs-- GTE's performance has not been reviewed by the state commissions. e.spire's experience in GTE markets in Florida, Kentucky and Texas suggests that absent scrutiny and substantial federal commitments to CLECs, GTE is likewise not deserving of the reward of a merger approval at this time.

IV. CONCLUSION

For the foregoing reasons, e.spire respectfully requests that the Commission deny the Application of Bell Atlantic and GTE to transfer control of GTE as contrary to the public interest.

Respectfully submitted,

E.SPIRE COMMUNICATIONS, INC.

By: Andrea D. Pruitt

Riley M. Murphy
James F. Falvey
E.SPIRE COMMUNICATIONS, INC.
133 National Business Parkway
Suite 200
Annapolis Junction, Maryland 20701

Brad E. Mutschelknaus
Andrea D. Pruitt
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.,
Suite 500
Washington, D.C. 20036

Its Attorneys

Dated: November 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 1998, a copy of **Opposition of e.spire Communications, Inc.** was sent via first-class mail, postage prepaid, to the following:

Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554
(Hand Delivery)

Regina M. Keeney, Chief
International Bureau
Federal Communications Commission
2000 M Street, NW
Room 800
Washington, DC 20554
(Two copies, By Hand Delivery)

Ms. Jeanine Poltronieri
Wireless Telecommunications Bureau
2025 M Street, NW
Room 5002
Washington, DC 20054
(By Hand Delivery)

International Transcription Services, Inc.
1231 20th Street, NW
Washington, DC 20036
(By Hand Delivery)

Carol E. Matthey, Chief
Policy and Program Planning Division
Federal Communications Commission
Common Carrier Bureau
1919 M Street, NW, Room 544
Washington, DC 20554
(Two copies, By Hand Delivery)

Steven E. Weingarten, Chief
Commercial Wireless Division
Federal Communications Commission
2100 M Street, NW
Room 7023
Washington, DC 20554
(By Hand Delivery)

Ms. Cecilia Stephens
Policy and Program Planning Division
Federal Communications Commission
Common Carrier Bureau, Room 544
1919 M Street, NW
Washington, DC 20554
(w/diskette, By Hand Delivery)

Kathryn A. Brown, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 500
Washington, DC 20554
(By Hand Delivery)

William P. Barr
Executive Vice President – Government
and Regulatory Advocacy & General
Counsel
GTE CORPORATION
One Stamford Forum
Stamford, Connecticut 06904

James R. Young
Executive Vice President -
General Counsel
BELL ATLANTIC CORPORATION
1095 Avenue of the Americas
New York, New York 10036


Andrea Pruitt